

1 HONORABLE JAMES L. ROBART
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 MICROSOFT CORPORATION,

10 Plaintiff,

11 vs.

12 MOTOROLA, INC., et al.,

13 Defendants.

14

MOTOROLA MOBILITY LLC, et al.,

15 Plaintiffs,

16 vs.

17 MICROSOFT CORPORATION,

18 Defendants.

Case No. C10-1823-JLR

MICROSOFT'S 7/29/13
MOTION TO SEAL

NOTED FOR:
FRIDAY, AUGUST 9, 2013

19
20 **I. RELIEF REQUESTED**

21 Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order
22 entered in this case, Microsoft respectfully seeks leave to file under seal the following
23 documents:

24 (1) Portions of Exhibits 2-4 and 6-11 to the Declaration of Christopher Wion in
25 Support of Microsoft's Motions *in Limine* ("Wion Declaration");

1 (2) Microsoft's Motions *in Limine* to the extent they refer to or rely on the above
 2 exhibits; and
 3 (3) The Parties' Pretrial Order being filed contemporaneously herewith.

4 Microsoft seeks to file the foregoing materials under seal because they have been
 5 marked as "Confidential" by Motorola and/or Microsoft under the terms of the protective order
 6 issued in this case. To the extent these documents disclose the parties' negotiating history (the
 7 subject of Microsoft's third motion *in limine*), the parties agree that said documents should
 8 remain under seal. In fact, the Court has previously found that those negotiations could be
 9 sealed. *See* 11/12/12 Order on Motions to Seal (Dkt. No. 567), at 5 ("Accordingly, the court
 10 concludes that the importance of encouraging frank settlement negotiations outweighs the
 11 public's interest in knowing what was discussed in those settlement negotiations").

12 Microsoft also moves to seal limited portions of the Pretrial Order that disclose costs
 13 and expenses Microsoft incurred in connection with relocation of its distribution facility from
 14 Germany to The Netherlands, and the amount of attorneys' fees incurred in connection with
 15 defending itself against Motorola's suits for injunctive relief.

16 Microsoft takes no position with respect to the other materials Motorola has requested
 17 be sealed, or with respect to those paragraphs of the Pretrial Order that Motorola has requested
 18 be sealed.

19 For these reasons, Microsoft respectfully requests permission to file the above-
 20 referenced documents under seal and that the Court direct such documents to remain under
 21 seal. Microsoft is publicly filing redacted versions of the Pretrial Order, its Motions *in Limine*,
 22 and Exhibits 6-7 of the Wion Declaration.

23 **II. LCR 5(g)(3)(A) CERTIFICATION**

24 The parties met and conferred on July 29, 2013 in an effort to minimize the amount of
 25 material to be filed under seal in connection with this motion. As a result, the parties were able

1 to reduce both the number of documents to be redacted (or sealed in their entirety) as well as
 2 the scope of the proposed redactions.

3 **III. FACTS & AUTHORITY**

4 **A. The Operative Protective Order and Applicable Court Rules Both Permit and**
Require Microsoft to File Confidential Information under Seal.

5 Pursuant to the Protective Order issued by the Court on July 21, 2011, as amended by
 6 orders dated October 3, 2012 and July 25, 2013, Microsoft is permitted to file materials
 7 designated by either party as Confidential Business Information¹ under seal, with such
 8 documents to remain under seal upon Court approval. Paragraphs 2(a) and 8 of the Protective
 9 Order govern the filing of documents under seal. Paragraph 2(a) provides:

10 Any information submitted in pre-trial discovery or in a pleading, motion, or
 11 response to a motion in this action, either voluntarily or pursuant to order, and
 12 which is asserted by a supplier to contain or constitute Confidential Business
 13 Information shall be so designated by such supplier in writing...and shall be
 14 segregated from other information being submitted. Documents shall be clearly
 15 and prominently marked on their face with the legend: “[SUPPLIER’S NAME]
 16 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO
 17 PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of
 18 this action, such information, whether submitted in writing or in oral testimony,
 19 shall be disclosed only *in camera* before the Court and shall be filed only under
 20 seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District
 21 Court for the Western District of Washington.

22 Paragraph 8 likewise provides that:

23 Any Confidential Business Information submitted to the Court in connection
 24 with a motion or other proceeding within the purview of this action shall be
 25 submitted under seal pursuant to paragraph 2 above.

26 *Id.*, at ¶ 8.

27 The Federal Rules of Civil Procedure recognize that courts may permit parties to file

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1 “trade secrets or other confidential research, development, or commercial information” under
 2 seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly
 3 competing needs and interests of the parties affected by discovery,” in crafting the appropriate
 4 treatment of documents for which protected treatment is requested. *Seattle Times Co. v.*
 5 *Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*,
 6 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

7 A party seeking to seal a judicial record attached to a dispositive motion must articulate
 8 “compelling reasons” that outweigh the public policies favoring disclosure. *Kamakana v. City*
 9 *and Cnty. Of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). This presumption may be
 10 overcome only on a compelling showing that the public’s right of access is outweighed by the
 11 interests of the public and the parties in protecting the court’s files from public review.
 12 However, “the public interest in understanding the judicial system would appear to be less
 13 where ... the documents in question are irrelevant to the Court’s decision.” *Network*
 14 *Appliance, Inc. v. Sun Microsystems Inc.*, 2010 WL 841274, at *2 (N.D. Cal. Mar. 10, 2010)
 15 (citing *Kamakana*, 447 F.3d at 1179) (documents supporting dispositive motion “[not] bearing
 16 on the resolution of the dispute on the merits ... are therefore more akin to the ‘unrelated,’ non-
 17 dispositive motion documents the Ninth Circuit contemplated in *Kamakana*”).

18 “In general, ‘compelling reasons’ ... exist when such ‘court files might have become a
 19 vehicle for improper purposes,’ such as the use of records to ... release trade secrets.”

20 *Kamakana*, 447 F.3d at 1179 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598
 21 (1978)). The Ninth Circuit has adopted the Restatement’s definition of “trade secret.” *See*
 22 *Ultimate Timing, L.L.C. v. Simms*, 2010 WL 786021, at *1-2 (W.D. Wash. Mar. 4, 2010)
 23 (citing *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972)). Under that standard, a “trade
 24 secret may consist of any formula, pattern, device or compilation of information which is used

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1 in one's business, and which gives him an opportunity to obtain an advantage over competitors
2 who do not know or use it." *Id.*, 2010 WL 786021, at *2 (quotations omitted).

B. Good Cause Exists to Grant Microsoft's Motion.

1. Microsoft seeks to seal portions of Exhibits 2-4 and 6-11 at Motorola's Request.

Motorola has requested that Microsoft file portions of Exhibits 2-4 and 6-11 under seal because they disclose Motorola's confidential business information. Pursuant to the terms of the protective order, Microsoft has filed these documents under seal. Microsoft takes no position with respect to the confidentiality of these documents.

2. The Parties' Licensing Negotiations Should Remain Sealed.

Microsoft’s third motion *in limine* relates to the parties’ negotiating history. The Court has already ruled that compelling reasons exist to maintain the confidentiality of the parties’ negotiating history. *See* 11/12/12 Order on Motions to Seal (Dkt. No. 567), at 5 (“Accordingly, the court concludes that the importance of encouraging frank settlement negotiations outweighs the public’s interest in knowing what was discussed in those settlement negotiations”). The Court has also previously sealed the Parties Nondisclosure Agreement (Dkt. No. 484). For these reasons, Microsoft respectfully requests that the Court grant its motion with respect to those sealed materials cited in Microsoft’s third motion *in limine*.

3. Portions of the Joint Pretrial Order Should Remain Sealed.

Microsoft redacted portions of the Pretrial Order that disclose the parties' negotiating history (paragraphs 3.C. 2-17), as well as two paragraphs that disclose the increased operating costs Microsoft was forced to incur as a result of having to relocate from Germany to The Netherlands and the fees Microsoft has been forced to pay to defend against Motorola's injunction actions (3.B.11 – 12).

1 The parties' negotiating history should be sealed for the reasons set forth above. The
2 financial figures should be sealed because they are not generally known or publicly available,
3 and the companies involved treat them as confidential for the reasons set forth in Microsoft's
4 previous motions to seal (*see, e.g.*, 7/17/13 Response to Motion to Seal (Dkt. No. 765)).

5 Microsoft takes no position with respect to those separate portions of the Pretrial Order
6 Motorola has requested be redacted.

7 **IV. CONCLUSION**

8 For the reasons set forth herein, Microsoft respectfully requests that the Court grant its
9 motion. A [Proposed] Order Granting Microsoft's 7/29/13 Motion to Seal has been submitted
10 herewith.²

11 DATED this 29th day of July, 2013.

13 **RESPECTFULLY SUBMITTED,**
14 CALFO HARRIGAN LEYH & EAKES LLP

15 By s/Arthur W. Harrigan, Jr.
Arthur W. Harrigan, Jr., WSBA #1751

16 By s/Christopher Wion
Christopher Wion, WSBA #33207

18 By s/Shane P. Cramer
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25 ² Nothing herein is intended as a waiver of Microsoft's right to contest Motorola's designation of material as
Confidential Business Information in accordance with the terms of the Protective Order. Microsoft expressly
reserves the right to do so as the circumstances warrant.

By s/T. Andrew Culbert
T. Andrew Culbert

By s/David E. Killough
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Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On this 29th day of July, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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30 DATED this 29th day of July, 2013.
31

32 /s/ Florine Fujita
33 FLORINE FUJITA